Canada Industrial Relations Board Conseil canadien des relations industrielles

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Reasons for decision

Pierre Angers; Alain Beaulieu; Eric Doré;
Sacha Mathys,

applicants,

and

International Association of Machinists and
Aerospace Workers, Transportation District 140;
and Air Canada,

respondents.

Board File: 28376-C
Neutral Citation: 2011 CIRB **571**
February 21, 2011

The Canada Industrial Relations Board (the Board) was composed of Ms. Elizabeth E. MacPherson, Chairperson, and Mr. Graham J. Clarke and Ms. Louise Fecteau, Vice-Chairpersons.

Section 16.1 of the *Canada Labour Code (Part I Industrial Relations)* (the *Code*) provides that the Board may decide any matter before it without holding an oral hearing. Having reviewed the material on file, the Board is satisfied that the documentation before it is sufficient for it to determine this application without an oral hearing.

These reasons for decision were written by Ms. Louise Fecteau, Vice-Chairperson.

I–Nature of the Application and Background

[1] Messrs. Sacha Mathys, Pierre Angers, Eric Doré and Alain Beaulieu (the applicants) filed separate applications for reconsideration of the Board's decision of August 24, 2010 (*Richard Vézina*, 2010 CIRB 540) (RD 540), pursuant to section 18 of the *Code*. Mr. Mathys filed his application on September 13, 2010; Mr. Angers, on September 14, 2010; Mr. Doré, on September 16, 2010; and Mr. Beaulieu, on September 22, 2010. The Board has consolidated these applications for reconsideration of RD 540 as they raise common issues.

[2] It is important to note that the Board originally had before it more than 40 complaints from employees of Air Canada (the employer), alleging violation of section 37 of the *Code* by the International Association of Machinists and Aerospace Workers, Transportation District 140 (the IAMAW or the union). Two files (27635-C and 27616-C) were opened to deal with the said complaints, and RD 540 applied to all of the complaints. Of the four applicants named above, only two, Messrs. Eric Doré and Alain Beaulieu, were complainants in one of the files to which RD 540 applies. Consequently, the applications of Messrs. Mathys and Angers will not be considered, as these applicants do not have the requisite standing to file an application for reconsideration.

[3] The complaints filed with the Board by Messrs. Doré and Beaulieu alleged that the union had acted in a discriminatory manner when it decided to hold a second ratification vote for members of the Technical, Maintenance and Operational Support (TMOS) bargaining unit on a tentative agreement to extend the term of the existing collective agreement for a period of 21 months. In the initial vote, the members of the TMOS unit had rejected the tentative agreement.

[4] In its decision dismissing the complaints, the Board stated the following:

> [49] The Board finds that the union's decision to hold a further ratification vote on July 14, 2009, on the tentative agreement following the issuance of the four letters of clarification by the employer, is solely a matter of internal union affairs. The Board's jurisdiction under the *Code* to determine complaints alleging that a union has breached its duty of fair representation to its members does not extend in these circumstances to an examination of whether the union's decision to hold a further vote was or was not consistent with its constitution or by-laws. The Board therefore finds that the union was not engaged in the representation of its members "with respect to their rights under the collective agreement that is applicable to them", within the meaning of those words in section 37 of the *Code*, when the union reached

its decision to hold a further vote. Given that finding, the Board must dismiss the complaints for lack of jurisdiction.

[50] In any event, even if the Board had jurisdiction under the *Code* over the subject matter of these complaints, the Board finds no evidence that the union was acting in a manner that was arbitrary, discriminatory or in bad faith when the union decided on July 6, 2009, to hold a further ratification vote on July 14, 2009. ...

(RD 540)

II–Grounds Raised

[5] The grounds raised in support of the applications for reconsideration are as follows:

- the initial complaints should have been dealt with individually;
- the complainants were denied their rights of reply;
- there was a failure to respect the Board's jurisprudence;
- there appeared to be conflicts of interest involving two of the three panel members.

III–Analysis and Decision

A–Timeliness

[6] The Board notes that the reconsideration applications of Messrs. Doré and Beaulieu, filed on September 16 and 22, 2010 respectively, were both filed more than 21 days after the date on which RD 540 was issued. Although both applications are therefore untimely pursuant to section 45(2) of the *Canada Industrial Relations Board Regulations, 2001* (the *Regulations*), given the seriousness of the allegations, the Board has determined that it is appropriate to grant an extension of the time limit pursuant to section 46 of the *Regulations* and to consider the merits of those allegations.

B–Allegation That the Initial Complaints Should Have Been Dealt With Individually

[7] On July 9, 2009, the Board received 16 identical complaints that were consolidated as Board file no. 27616-C. Between July 20 and August 17, 2009, the Board received another 25 similar

complaints that were consolidated as Board file no. 27635-C. The complaints filed by Mr. Doré and Mr. Beaulieu were part of Board file no. 27635-C. All of the complaints alleged that the IAMAW had breached section 37 of the *Code* when it conducted a second ratification vote for the members of the TMOS bargaining unit. As the complaints were based on common events, the Board dealt with the two files, comprised of a total of 41 individual complaints, at the same time.

[8] The applicants contend that the Board should have treated each complaint individually, as each complainant had provided his/her own reasons and evidence in his/her complaint and were entitled to be treated individually.

[9] Section 20 of the *Regulations* provides the Board with the authority to consolidate proceedings:

> 20. The Board may order, in respect of two or more proceedings, that they be consolidated, heard together or heard consecutively.

[10] For reasons of economy and efficiency, it is the Board's practice to consolidate complaints involving the same parties which are based on similar facts. The reconsideration panel can find no error of law or policy and no denial of natural justice in the fact that this practice was followed in the case of Board file nos. 27616-C and 27635-C, given that the Board reviewed and considered all of the submissions of the parties in the context of its deliberations.

C–Allegation That the Complainants Were Denied their Right of Reply

[11] The applicants allege that they were not provided with an opportunity to reply to the submissions of the union and the employer regarding their complaint. There are two aspects to this allegation: that the Board did not hold an oral hearing and that the Board did not solicit a reply from the applicants.

[12] The Board is not obliged to hold an oral hearing in every case. Section 16.1 of the *Code* provides:

> 16.1 The Board may decide any matter before it without holding an oral hearing.

[13] It is not the Board's practice to hold hearings in every case. The Board will normally not hold a hearing unless there are issues of credibility or other sound industrial relations reasons that require it to hear the witnesses in person. There is no requirement for the Board to give notice to the parties of its intention not to hold a hearing (see *NAV CANADA*, 2000 CIRB 468, affirmed in *NAV Canada* v. *International Brotherhood of Electrical Workers*, 2001 FCA 30). Information Circular No. 4, posted on the Board's website, advises complainants that:

> The Board makes the decision as to whether to hold an oral hearing on the basis of the documents on file and the written representations of the parties. **It is therefore in the best interest of the parties to file full, accurate and detailed submissions in support of their respective positions**. A party requesting that a hearing be held in a matter must include detailed reasons why they think a hearing is required.
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> (emphasis added)

[14] As indicated in RD 540 at paragraph 1, the Board considered whether to conduct an oral hearing, but exercised its discretion not to do so, as it was of the opinion that the written documentation before it was sufficient.

[15] With respect to the file that the applicants in this matter were involved in (Board file no. 27635-C), the Board sent a letter to all complainants and respondents on September 15, 2009 (document no. 268957), which contained the following instructions:

> Further to the Board's correspondences for the period of July 20, 2009 to August 17, 2009, the Board has reviewed the above-noted complaints and wishes to invite the respondent trade union and the employer to respond to the complaints. If either party wishes to file a response with the Board, they have until Friday October 16, 2009 to respond. **The complainants will then have until Wednesday October 30, 2009 to file a reply.** The Board's practice is not to grant extensions to these time limits except in exceptional circumstances. Your attention is directed to sections 9, 12 and 13 of the *Canada Industrial Relations Board Regulations, 2001* (the *Regulations*), which outline the criteria that must be met in order to file a response or reply to the complaint.
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> (emphasis added)

[16] The union and the employer each filed a written response on October 16, 2009, which was copied to the complainants. None of the complainants, including the applicants in this matter, filed a reply to the responses.

[17] As the Board was under no obligation to conduct an oral hearing and the applicants were provided with an opportunity to reply to the respondents' written submissions and failed to do so, the Board dismisses their allegation that they were denied the right of reply.

D–Alleged Failure to Respect the Board's Jurisprudence

[18] The applicants suggest that, in dealing with the section 37 complaints, the Board should have followed its decision in *George Cairns*, 1999 CIRB 35. In that decision, the Board found that the Brotherhood of Locomotive Engineers (BLE) had violated its duty of fair representation when it negotiated a collective agreement that favoured locomotive engineers employed by VIA Rail Canada Inc. (VIA Rail), to the detriment of the complainants, who were conductors and assistant conductors formerly represented by the United Transportation Union (UTU). The Board found that, following its decision to merge the BLE and UTU bargaining units and certify the BLE to represent the merged unit, the BLE continued to maintain the distinction between the two groups of employees and thus did not fulfil its institutional role as bargaining agent for all of its members.

[19] While certain members of the IAMAW bargaining unit at Air Canada who are affected by the employer's decision to sell its maintenance, repair and overhaul (MRO) business feel that the union has not done enough to represent their interests, their situation can be clearly distinguished from that of the former UTU members at VIA Rail. Far from negotiating less favourable conditions for one portion of its bargaining unit, as the BLE had done, the pleadings demonstrate that the IAMAW made every effort to protect all of the members of its bargaining unit–and particularly those affected by the sale of the MRO business–as it negotiated with Air Canada under very difficult circumstances.

[20] The Board can find no merit in the applicants' allegation that the Board should have applied the reasoning in *George Cairns*, *supra*, to the circumstances of their complaints.

E–Perceived Conflicts of Interest or Apprehension of Bias

[21] The applicants allege that there is a perceived conflict of interest on the part of two members of the original panel, owing to the fact that they had, in the past, held positions with either the respondent union and/or the employer. Allegations of this nature are serious and cannot be taken lightly, as they call into question not only the personal integrity of the individuals, but also the integrity of the Board. The issue of perceived conflict of interest or reasonable apprehension of bias was summarized by the Board in *Emerald Transport, Division of Emerald Agencies Inc.*, 2000 CIRB 91, as follows:

> [28] The "test" or standard for determining the disqualification of a panel of the CIRB is that of "reasonable apprehension of bias," which the applicant (Emerald) bears the onus of establishing. This is an objective test, based on whether a reasonable, well-informed person considering all the facts would conclude that there is a real likelihood the decision-maker will favour one party over the other. Proof of actual bias is not necessary. Rather, the possibility or likelihood of prejudice in the eyes of reasonable people is what matters. However, a reasonable apprehension of bias is a question of fact, necessitating an examination of the full circumstances and their specific context.

[22] The Board is a representative board. It was described in *Emerald Transport, Division of Emerald Agencies Inc.*, *supra*, as follows:

> [22] On January 1, 1999, the Canada Industrial Relations Board (hereinafter the "CIRB") was established as a representative board. The Board is responsible for the interpretation, application and administration of the *Code*. Its full-time complement includes its Chairperson, presently four Vice-Chairpersons, and the maximum of six members of whom three are representative of employees and three of employers. There are also six part-time members of whom equal numbers are representative of employees and employers. All Board members are appointed by the Governor in Council for fixed terms to hold office "during good behaviour." In addition, they are subject to "remedial or disciplinary measures" if found by a formal inquiry "incapacitated from the proper execution of that office by reason of infirmity," "guilty of misconduct," having "failed in the proper execution of that office" or having been placed "by conduct or otherwise, in a position that is incompatible with the due execution of that office."
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> [23] Matters coming before the Board may be determined by the Chairperson or a Vice-Chairperson alone or by a tripartite panel comprising either the Chairperson or a Vice-Chairperson together with at least one employee representative and one employer representative. Under section 12.01(1) of the *Code*, the Chairperson has "supervision over and direction of the work of the Board, including the assignment and reassignment of matters that the Board is seized of to panels" and "the composition of panels and the assignment of Vice-Chairpersons to preside over panels."

[23] In *TELUS Communications Inc.*, 2001 CIRB 125, the Board looked at the issues of work experience and the time elapsed since certain members of the panel had been appointed. It stated the following:

> [9] Every member, including every vice-chairperson, has worked with various organizations and employers in order to obtain the expertise required to properly and competently discharge the duties of the adjudicative positions into which they have been appointed. All the Board members have many decades of experience that often include several organizations, employers, industries and professional affiliations on both a local and national level.
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> [10] The Board has taken this preliminary objection extremely seriously, given that the questions implicit in the challenge to the constitution of the panel strike at the very root of the representative structure that Parliament has determined should be applied to the Canada Industrial Relations Board. It has significant implications on the ability of the Board to effectively deal with the hundreds of applications that are filed with the Board each year. Nonetheless, the Board is aware of the pitfalls implicit in a representative Board. The Board has already had a previous opportunity to review the issue in detail involving another Member. In that case this Vice-Chairperson, writing on behalf of another panel of the Board, made a determination on apprehension of bias in which the reasonable apprehension was found to exist (see *Dynamex Canada Inc.*, April 9, 2001 (CIRB LD 432)).
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> [11] The issue, as correctly categorized by the union's counsel, is the issue of *remoteness*, in relation to the perceived affiliation that could be viewed as affecting one's objectivity in adjudication. Is one year affiliation to be considered too close? Is three years too close? Five years or twenty years too close? When is an affiliation with a particular party or individual too close? Does one's previous membership or involvement in an organization or with certain individuals automatically raise the spectre of bias? **The existence of these general past connections do not translate into a reasonable apprehension of bias, without more. There must be a specific basis grounded in fact upon which to justify a concern**.
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> (emphasis added)

[24] Neither of the applicants have suggested that any of the panel members had a personal relationship with any of the parties to the original complaints or had any personal interest in the outcome of those complaints. The applications for reconsideration simply state that, because two of the three members of the original panel worked for either the IAMAW or the employer at some time in the past, the applicants were of the opinion that there was an appearance of conflict of interest on their part.

[25] The Board is an expert administrative tribunal. The raison d'être for the appointment of persons with a background in labour relations to the Board is to enable them to use their knowledge and experience to render informed decisions. The *Code* expressly provides that tripartite Board panels

will have an employer and an employee representative. These representative members are appointed precisely because of their past experience and expertise in labour relations. Nevertheless, to avoid any apprehension of bias, representative members are normally not appointed to hear any case involving a former employer for a period of at least two years from the date on which they join the Board. Representative members are not appointed to any matter in which thay have had a direct interest at any time in the past.

[26] In this case, one of the two panel members in question did indeed work for both Air Canada and the IAMAW during the course of his career and the other worked for Air Canada in different capacities over a period of time. However, at the time that the original complaints were heard, the first member had been with the Board since March 1999 (that is, more than 10 years) and the other had been a Board member since April 2005 (that is, more than five years).

[27] In the Board's opinion, the length of time that had passed since either of these members worked for the IAMAW or Air Canada is sufficient to overcome any concern regarding a possible apprehension of bias. Further, the applicants did not provide any specific examples of a fact or circumstance casting doubt on the objectivity of the two members in question.

[28] For all of these reasons, the Board dismisses both applications for reconsideration of RD 540.

[29] This is a unanimous decision of the Board.

Elizabeth MacPherson
Chairperson

Graham J. Clarke
Vice-Chairperson

Louise Fecteau
Vice-Chairperson